

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 24 April 2007

BALCA Case No.: 2007-PER-00022
ETA Case No.: A-05276-38747

In the Matter of:

VIRGINIA GENERAL SERVICES, INC.,
Employer,

on behalf of

DAGOBERTO GARCIA,
Alien.

Certifying Officer: Melanie Shay
Atlanta Processing Center

Appearances: Gary M. Buff, Associate Solicitor
Harry L. Sheinfeld, Counsel for Litigation
Frank P. Buckley, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Edgar Rodriquez
Pro Se for the Employer

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations.¹

BACKGROUND

On January 3, 2006, the Employer – a General Contractor – filed an Application for Permanent Employment Certification on behalf of the Alien for the position of Construction Laborer. (AF 1, 14-15).² On January 5, 2006, the Certifying Officer (CO) denied certification because the application indicated that a Sunday edition of a newspaper of general circulation was available but not used in violation of 20 C.F.R. § 656.17(e). (AF 11-13). The Employer requested reconsideration arguing that it had used a newspaper with a Monday through Friday schedule, and that the Friday edition remained available in news-stands and newspaper boxes throughout the entire week-end. (AF 3-5). In a determination letter dated February 22, 2007, the CO rejected this argument, finding that the fact that a Friday edition of a newspaper may be available through the course of a weekend does not overcome failure to comply with the regulatory requirement of running an advertisement on a Sunday. (AF 1). The matter was then referred to this Board and a briefing schedule issued on March 1, 2007.

By letter dated March 27, 2007, the Employer's President stated that he "was under the impression that because one of our advertisements ran a full week it would satisfy the requirement of having a classified ad come out on a Sunday." The Employer offered to run another advertisement on a Sunday. The CO filed a brief dated March 30, 2007 arguing that the denial of certification should be affirmed because the second advertisement had not been run on a Sunday.

¹ The PERM regulations appear in the 2006 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2006).

² AF is an abbreviation for "Appeal File."

DISCUSSION

Under 20 C.F.R. § 656.17(e), most sponsoring employers are required to attest to having conducted recruitment prior to filing the application. Among other requirements, applications involving both professional and non-professional occupations normally require the sponsoring employer to attest to having placed two print advertisements on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity. 20 C.F.R. § 656.17(e)(1)(i)(B) and 656.17(e)(2)(ii). Although the two-Sunday publication requirement has certain exceptions,³ they are not applicable to the instant application.

The Employer's argument in the request for reconsideration that the availability of a Friday edition of a newspaper through the course of a weekend complies with the requirement is not supported by the regulations. Similarly lacking in support is the argument made in the Employer's appellate brief that running one advertisement for a full week satisfies the regulatory requirements. Clearly, the Employer in this case needed to run two Sunday advertisements to comply with the regulations. Accordingly, the CO properly denied certification.

Although the Employer offered in its appellate brief to run another Sunday advertisement, the Board's scope of review is limited to the record made before the CO. 20 C.F.R. § 656.27(c). Thus, the Board cannot consider evidence not developed before the CO. *See Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (en banc) (pre-PERM decision interpreting similar regulation regarding scope of Board review). The Employer's remedy is to file a new application.

³ See 20 C.F.R. §§ 656.17(e)(1)(i)(B)(2) and 656.17(e)(2)(ii)(B) (rural areas without Sunday newspaper editions available); 20 C.F.R. § 656.17(e)(1)(i)(B)(4) (one Sunday newspaper publication can be substituted with publication in a professional journal where the offer involves a professional job requiring experience and an advanced degree, and a professional journal would normally be used to advertise such a job opportunity).

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.